

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OLUGBENGA O. ABIONA,	:	CIVIL ACTION
	:	
Plaintiff	:	
	:	
v.	:	
	:	
PNC BANK, N.A. and	:	
LYNETTE D. WILSON,	:	
	:	
Defendants	:	No. 98-1994

M E M O R A N D U M

Padova, J. July , 1998

Plaintiff, Olugbenga O. Abiona, brought this diversity action against Defendants, PNC Bank, N.A. and Lynette D. Wilson. Defendants have moved to dismiss the Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). For reasons discussed below, the Court will grant the Motion to Dismiss pursuant to Rule 12(b)(1).

I. BACKGROUND:

Plaintiff alleges the following in his Complaint: On or about March 31, 1998, Plaintiff deposited a check in the amount of \$1,000 in his account with Defendant PNC Bank, N.A. ("PNC"). Plaintiff determined that the check had cleared the account at the bank on which he wrote it on April 1, 1998; however, when he withdrew cash from his PNC account on April 4, 1998, he found the check had not been credited and his account was overdrawn. Plaintiff immediately called PNC's customer service line and complained. He was told that an investigation would be initiated and the funds would be credited. On Monday, April 6, 1998,

Plaintiff went to a PNC branch office to complain about the failure to credit his account with the \$1,000. Lynette D. Wilson, an employee of PNC, refused to help Plaintiff and shouted at him that the bank could not initiate any investigation unless Plaintiff produced a cancelled check confirming that the deposit was made. Plaintiff was humiliated and embarrassed by Defendant Wilson's behavior. On April 8, 1998, after securing a copy of the cancelled check, Plaintiff took it to bank employee, John Dugan, who made a copy of it and assured Plaintiff that the money would be credited to his account immediately, but it was not. Subsequently, Plaintiff spoke with John Dugan numerous times and was repeatedly assured that the \$1,000 would be credited to his account, but it was not. On April 14, fourteen days after the deposit was made, the \$1,000 had still not been credited to Plaintiff's account and the account was still overdrawn. Plaintiff claims that, as a result of Defendants' wrongful acts, he has been and still is deprived of his money, he has suffered economic loss, has been taken away from his business, and has lost interest on his deprived funds. He further alleges that he has suffered annoyance, emotional distress, humiliation, and embarrassment.

Plaintiff sues Defendants for breach of contract (Count I); bad faith (Count II); negligence (Count III); violation of the Pennsylvania Uniform Fiduciaries Act, 7 Pa Stat. Ann. § 6351 et seq. (West 1995) (Count IV); and violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat.

Ann § 201 et seq. (West 1993 & Supp. 1997) (Count V). He seeks compensatory and punitive damages in excess of \$75,000, attorney's fees, interests, and costs.

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(1), there are two types of challenges to subject matter jurisdiction: facial and factual. In considering a facial attack, the court must accept the truth of the allegations in the complaint. By contrast, in considering a factual attack, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." Podsobinski v. Roizman, No. Civ.A. 97-4976, 1998 WL 67548, at *2 (E.D. Pa. Feb. 13, 1998) (quoting Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977)). On a motion to dismiss for lack of subject matter jurisdiction, it is the plaintiff who bears the burden of showing that jurisdiction exists. Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991).

Diversity jurisdiction requires an amount in controversy in excess of \$75,000 exclusive of interest and costs. 28 U.S.C.A. § 1332(a). "This provision must be narrowly construed so as not to frustrate the congressional purpose behind it: to keep the diversity caseload of the federal courts under some modicum of control." Packard v. Provident National Bank,

994 F.2d 1039, 1044 (3d Cir. 1993). For purposes of measuring the amount in controversy, "the sum claimed by the plaintiff controls if the claim is apparently made in good faith. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288, 58 S. Ct. 586, 590 (1938). A motion to dismiss a complaint for lack of the jurisdictional amount should be granted only if "from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction." Id., 303 U.S. at 289, 58 S. Ct. at 590; 14A Wright, Miller & Cooper, Federal Practice and Procedure § 3702, at 12-13, 19 (2d ed.). It is the burden of the plaintiff to show the absence of such "legal certainty" and the amount is judged as of the time of filing the complaint. St. Paul Mercury, 303 U.S. at 290, 58 S. Ct. at 590-91; Carlough v. Amchem Products, Inc., 834 F. Supp. 1437, 1456 (E.D. Pa. 1993).

Claims for punitive damages generally must be included in computing the amount in controversy. See Bell v. Preferred Life Assur. Soc'y, 320 U.S. 238, 240, 64 S. Ct. 5, 6 (1943). However, in determining the jurisdictional amount, "a claim for punitive damages is to be given closer scrutiny and the trial judge accorded greater discretion, than a claim for actual damages." Singer v. State Farm Mutual Automobile Ins. Co., 785 F. Supp. 510, 512 (E.D. Pa. 1992) (quoting Zahn v. International

Paper Co., 469 F.2d 1033, 1034 n.1 (2d Cir. 1972), aff'd, 414 U.S. 291, 94 S. Ct. 505 (1974). "[W]hen it appears that such a claim [for punitive damages] comprises the bulk of the amount in controversy and may have been colorably asserted solely or primarily for the purpose of conferring jurisdiction, that claim should be given particularly close scrutiny." Packard, 994 F.2d at 1946. Under Pennsylvania law, in order to recover punitive damages, the plaintiff must first prove actual compensatory damages. Martin v. Johns-Manville Corp., 494 A.2d 1088, 1098 (Pa. 1985). In addition, any punitive damages which are awarded must bear a reasonable relationship to the actual compensatory damages. Id.

III. DISCUSSION

Defendants contend that the Court has no subject matter jurisdiction because the amount in controversy is less than \$75,000. They further contend that Plaintiff suffered no actual damages because the \$1,000 was credited to his account before he filed this law suit. Defendants maintain that, because under Pennsylvania law, Plaintiff cannot recover punitive damages unless he sustained actual damages, and because Plaintiff sustained no actual damages, this case does not meet the jurisdictional amount in controversy. Martin v. Johns-Manville Corp., 494 A.2d at 1098.

Defendants attach to their Motion the affidavit of John Dugan. Plaintiff argues that the Court cannot consider Dugan's

affidavit without converting the Motion to Dismiss into one for Summary Judgment. Fed.R.Civ.P. 12(b). While that is true under Rule 12(b)(6), it is not so under Rule 12(b)(1) when considering a factual challenge to subject matter jurisdiction. As the Third Circuit has stated:

At the outset we must emphasize a crucial distinction, often overlooked, between 12(b)(1) motions that attack the complaint on its face and 12(b)(1) motions that attack the existence of subject matter jurisdiction in fact, quite apart from any pleadings. The facial attack does offer similar safeguards to the plaintiff: the court must consider the allegations of the complaint as true. The factual attack, however, differs greatly for here the trial court may proceed as it never could under 12(b)(6) or Fed.R.Civ.P. 56. Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction -- its very power to hear the case -- there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist.

Mortensen, 549 F.2d at 891-92 (footnote omitted). This Court may therefore consider evidence as to the jurisdictional amount.

In his affidavit, John Dugan states that the \$1000 was credited to Plaintiff's account on April 14, 1998. This suit was filed on April 15, 1998. Defendants point out that the amount of damages is determined as of the time the Complaint was filed, Carlough, 834 F. Supp. at 1457, and they argue that at the time the Complaint was filed, Plaintiff had no actual damages. Dugan further states that all charges which were incurred on the

account have been reversed and that no checks were returned. Given that the amount in controversy is calculated as of the time the suit is filed, if Defendants credited the \$1000 before the suit was filed, that would mean that Plaintiff has no actual damages and, under Pennsylvania law, cannot therefore claim punitive damages. Martin v. Johns-Manville Corp., 494 A.2d at 1098.

When subject matter jurisdiction is challenged under Rule 12(b)(1), Plaintiff has the burden of showing that it exists. Kehr Packages, 926 F.2d at 1409. Plaintiff has attached his own affidavit to his Memorandum in Response to Defendants' Motion to Dismiss. In it, he states:

13. At 5:40 p.m. on April 14, 1998, I again checked the balance in my account, which showed a negative balance of -\$20.64. Attached hereto as Exhibit F is a copy of the PNC Bank teller machine receipt of April 14, 1998. John Dugan's affidavit that my account was credited for \$1,000.00 on April 14, 1998 is absolutely false. It was after I noticed that my account was still negative at 5:40 p.m. on April 14, 1998, that I finally decided to file the Complaint first thing the next morning.

14. At 10:06 a.m., April 15, 1998, I filed the within Complaint against Defendants. Exhibit G is the receipt showing the time of filing this Complaint.

(Pl.'s Resp., Pl's Aff. (emphasis omitted).) Attached to Plaintiff's Response as Exhibit D is a fax cover letter from Plaintiff to John Dugan, sent on April 14, 1998 at 4:50 p.m. It states, "Attached pls [sic] find a Complaint which I shall file first thing tomorrow morning. You can give this to your corporate counsel. I checked my balance this afternoon, and it

is still negative balance. Your bank's conduct is strictly bad faith and malicious." (Pl.'s Aff. Ex. D.)

Plaintiff has submitted evidence that his account had not been credited with the \$1000 by 5:40 p.m on April 14, 1998, but he has presented no evidence that the amount was not credited later on that day. Given Plaintiff's fax to Mr. Dugan on the eve of filing suit, it would not be surprising that PNC would take immediate steps to see that the money was credited. By giving Defendants notice when he did, Plaintiff gave them the opportunity to correct their error before the suit was filed. Defendants have presented evidence in the form of John Dugan's affidavit that PNC did credit the \$1000 to his account on April 14, 1998, and Plaintiff has failed to rebut it. Therefore, Plaintiff has not met his burden of rebutting Defendants' challenge to this Court's subject matter jurisdiction.

Even if the Court were to consider a facial attack on the Complaint, in which case it would consider all the allegations in the Complaint as true and would exclude the affidavits of John Dugan and Plaintiff, the Court would find that it does not have subject matter jurisdiction. Plaintiff acknowledges that he has \$1,000 "actual damages," and he does not claim any significant amount in consequential damages. That means that the bulk of the jurisdictional amount of over \$75,000 would have to be made up of punitive damages. Where, as here, it appears that a claim for punitive damages "comprises the bulk of the amount in controversy and may have been colorably asserted

solely or primarily for the purpose of conferring jurisdiction, that claim should be given particularly close scrutiny."

Packard, 994 F.2d at 1946. Given that, under Pennsylvania law, any punitive damages would have to bear a reasonable relationship to the actual compensatory damages, Martin, 494 A.2d at 1098, it is inconceivable to this Court that Plaintiff could sustain a punitive damages award in this case that could bridge the gap of some \$74,000 and allow Plaintiff to meet the jurisdictional amount. See, e.g., Singer v. State Farm Mutual Automobile Ins. Co., 785 F. Supp. 510 (E.D. Pa. 1992); (holding claim for unpaid medical bills for \$5,334.43 plus punitive damages for bad faith in insurance practices did not meet jurisdictional amount); McDonough v. Crum & Foster Personal Ins., Civ. A. No. 92-0385, 1992 WL 114951 (E.D. Pa. May 20, 1992) (holding suit seeking to recover \$1817 in improperly collected surcharges and punitive damages did not meet jurisdictional amount of \$50,000).

III. CONCLUSION

Once Defendants have challenged this Court's subject matter jurisdiction, it is Plaintiff's burden to show that subject matter jurisdiction exists. The Court concludes that Plaintiff has not met his burden, and it will therefore dismiss the Complaint for lack of subject matter jurisdiction. Because the Complaint will be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1), it will not be necessary to address the Defendants' argument under Rule 12(b)(6).

An appropriate Order follows.

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Plaintiff	:	
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v.	:	
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PNC BANK, N.A. and	:	
LYNETTE D. WILSON,	:	
	:	
Defendants	:	No. 98-1994

O R D E R

AND NOW, this day of July, 1998, upon
consideration of Defendants' Motion to Dismiss pursuant to
Federal Rule of Civil Procedure 12(b)(1) for lack of subject
matter jurisdiction (Doc. No. 2), Plaintiff's Response (Doc. No.
3), and Defendants' Reply (Doc. No. 4), **IT IS HEREBY ORDERED** that
said Motion is **GRANTED** and this case is **DISMISSED**.

BY THE COURT:

JOHN R. PADOVA, J.